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DEPARTMENT OF AGRICULTURE

Office of Procurement and Property Management

7 CFR Part 3201

RIN 0599-AA18

Guidelines for Designating Biobased Products for Federal Procurement

AGENCY: Office of Procurement and Property Management, USDA.

ACTION: Final rule; amendments.

SUMMARY: The U.S. Department of Agriculture (USDA) is amending its regulations concerning Guidelines for Designating Biobased Products for Federal Procurement to incorporate statutory changes to section 9002 of the Farm Security and Rural Investment Act (FSRIA) that were effected when the Food, Conservation, and Energy Act of 2008 (FCEA) was signed into law on June 18, 2008. USDA is also announcing that an additional rulemaking activity will be initiated to further amend the Guidelines to address the provisions of the recently signed Agricultural Act of 2014.

DATES: This rule is effective **[insert date 30 days after publication in the FEDERAL REGISTER]**.

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biopREFERRED@dm.usda.gov; phone (202) 205-4008. Information regarding the Federal biobased preferred procurement program (one part of the BioPreferred program) is available on the Internet at <http://www.biopREFERRED.gov>.

SUPPLEMENTARY INFORMATION:

The information presented in this preamble is organized as follows:

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I. Authority

The Guidelines for Designating Biobased Products for Federal Procurement (the Guidelines) are established under the authority of section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA), as amended by the Food,

Conservation, and Energy Act of 2008 (FCEA), 7 U.S.C. 8102.

(Section 9002 of FSRIA, as amended by FCEA, is referred to in this document as "section 9002").

II. Background

As originally enacted, section 9002 provides for the preferred procurement of biobased products by Federal agencies. USDA proposed the Guidelines for implementing this preferred procurement program on December 19, 2003 (68 FR 70730-70746). The Guidelines were promulgated on January 11, 2005 (70 FR 1792), and are contained in 7 CFR part 3201, "Guidelines for Designating Biobased Products for Federal Procurement."

On June 18, 2008, the FCEA was signed into law. Section 9001 of the FCEA includes several provisions that amend the provisions of section 9002 of FSRIA. On February 4, 2011, USDA published in the Federal Register a direct final rule amending the Guidelines to make them consistent with certain technical changes to section 9002 of FSRIA as required by the FCEA. The technical changes made in 2011 clarified specific terminology and definitions used in the Guidelines.

The purpose of today's rule amendments, which were proposed in the Federal Register on May 1, 2012, is to revise the Guidelines to incorporate programmatic changes to section 9002 of FSRIA that were included in the FCEA. These rule amendments do not affect products that have already been designated for

Federal procurement preference. Any changes necessary to the existing designation status of products will be established by future rulemaking actions.

III. Executive Summary

USDA is amending 7 CFR part 3201 for two reasons. The first reason is to incorporate statutory changes to section 9002 of the Farm Security and Rural Investment Act made by enactment of the Food, Conservation, and Energy Act on June 18, 2008. The second reason is to make improvements to the existing rule based on several years of operating experience.

A. Summary of Major Provisions of the Final Rule

1. Designation of Intermediate or Feedstock Categories

The designation of intermediate ingredient or feedstock categories will follow the same process that USDA uses in the ongoing designation of product categories. USDA will establish a minimum biobased content for each intermediate ingredient or feedstock category based on an evaluation of the available biobased content data. The minimum biobased content requirement will be set at the highest level practicable, considering technological limitations.

USDA recognizes that, in general, the Federal government does not purchase large quantities of intermediate ingredients and feedstocks. Designating such materials, then, represents a means to include finished products made from such designated

materials in the Federal biobased products procurement preference program.

Today's final rule establishes the procedure for designating product categories for those final products that are made from designated intermediate ingredients or feedstocks. The FCEA states that USDA shall "automatically designate" final products composed of designated intermediate ingredients or feedstocks if the content of the designated intermediate ingredients or feedstocks exceeds 50 percent of the final product (unless the Secretary determines a different composition percentage is appropriate). Even though the FCEA uses the term "automatically" when specifying that final products in these product categories are eligible for the Federal procurement preference, they still must be incorporated into the Guidelines by publication in the Federal Register. USDA is establishing a procedure whereby the designation of product categories that include these final products would be done in conjunction with the designation of the intermediate ingredient or feedstock categories.

2. Designation of Complex Assembly Categories

Today's final rule establishes procedures for designating complex assembly products (multi-component assembled products with one or more component(s) being made with biobased material) within the scope of the Federal biobased products procurement

preference program. Although section 9001 of FCEA does not specifically mention these multi-component assembled products, USDA believes that including this type of finished product in the BioPreferred program will encourage the increased use of biobased materials and, thus, further advance the objectives of the program.

Today's final rule specifies a procedure for determining the biobased content of complex assemblies. USDA is finalizing an equation that yields the ratio of the mass of biobased carbon in the assembly to the mass of total organic carbon in the assembly. USDA selected this approach because it yields the same biobased content that would be determined by ASTM D6866 if the assembly could be tested.

3. Replacement of "Designated Item" with "Designated Product Category"

Previously, the Guidelines used the term "designated item" to refer to a generic grouping of biobased products identified in subpart B as eligible for the procurement preference. The use of this term created some confusion, however, because the word "item" is also used in the Guidelines to refer to individual products rather than a generic grouping of products. USDA is replacing the term "designated item" with the term "designated product category." In addition, USDA is adding a definition for the term "qualified biobased product" to refer to

an individual product that meets the definition and minimum biobased content criteria for a designated product category and is, therefore, eligible for the procurement preference. Although these changes are not required by section 9001 of FCEA, USDA believes the changes add clarity to the rule.

4. Deletion of Mature Markets Exclusion

USDA is deleting the text previously found in paragraph (c)(2) of section 3201.5 that excluded products that were considered to be mature market products. This exclusion has been challenged by numerous stakeholder groups. The Agricultural Act of 2014, which was signed into law on February 7, 2014, includes provisions that remove the mature market exclusion. With today's final rule, USDA has removed the text previously found in paragraph (c)(2). USDA will proceed with a separate rulemaking package to address the provisions of the Agricultural Act of 2014.

B. Costs and Benefits

Type	Costs	Benefits
Quantitative	Unable to quantify at this time	Unable to quantify at this time
Qualitative	1. Costs of developing biobased alternative products; 2. Costs to gather and submit biobased product information on the BioPreferred Web site; 3. Loss of market share by	1. Advances the objectives of the BioPreferred program, as envisioned by Congress in developing the 2002 and 2008 Farm Bills. 2. Opens new (Federal) market for

	manufacturers who choose not to offer biobased versions of products.	biobased products that USDA designates. 3. Opportunity for new and emerging biobased products to be publicized via BioPreferred Web site.
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IV. Summary of Changes

As a result of public comments received on the proposed amendments to the Guidelines, USDA has made changes in finalizing the amendments. These changes are summarized in the remainder of this section. A summary of each comment received, USDA's response to the comment or group of related comments, and the rationale for any change made in the final rule is presented in section V.

A. 7 CFR 3201.1 - Purpose and scope.

This section has been finalized as proposed.

B. 7 CFR 3201.2 - Definitions.

The definition of "designated intermediate ingredients or feedstocks" was revised to clarify that finished products made from those materials qualify for preferred procurement only if they contain more than 50 percent (or another amount as specified in subpart B of this part) of the designated intermediate. The definition of "intermediate ingredients or feedstocks" was revised to provide clarity to the term "value

added processing" that is used in the definition.

C. 7 CFR 3201.3 - Applicability to Federal procurements; and 7 CFR 3201.4 - Procurement programs.

These two sections have been finalized as proposed.

D. 7 CFR 3201.5 - Category designation.

The text of paragraphs 3201.5(a) and (b) was edited to clarify that USDA will designate product categories rather than individual products. A new sentence was added to paragraph 3201.5(a)(3) to state that when intermediate ingredients or feedstocks are used in the production of products that fall within a previously designated product category, the minimum biobased content for those products (to qualify for the procurement preference) is the minimum specified for the product category in subpart B.

The language previously found in paragraph 3201.5(c)(2) specifying that "mature market" products would be excluded from the designation process has been deleted as proposed. However, the new language that was proposed to be added to paragraph (b)(2) has been dropped and the paragraph has been reserved for future use to address changes as a result of the Agricultural Act of 2014.

E. 7 CFR 3201.6 - Providing product information to Federal agencies.

This section has been finalized as proposed.

F. 7 CFR 3201.7 - Determining biobased content.

USDA has revised the procedure for determining the biobased content of final products composed of designated intermediate ingredient or feedstock materials. The revised procedure calculates biobased content as a percentage of the total organic carbon content in the final product. USDA has also revised the equation for calculating the biobased content of complex assemblies to be based on the ratio of the amount of biobased material in the assembly to the amount of total organic carbon in the assembly.

G. 7 CFR 3201.8 - Determining life cycle costs, environmental and health benefits, and performance.

USDA has revised the new title for the section, "Determining relative price, environmental and health benefits, and performance," by deleting the word "relative."

H. 7 CFR 3201.9 - Funding for testing.

This section has been reserved, as proposed.

V. Discussion of Public Comments

USDA solicited comments on the proposed amendments for 60 days ending on July 2, 2012. USDA received 19 comments by that date. Three of the comments were from individual citizens, 12 were from trade groups, and 4 were from biobased product manufacturers. The comments are presented below, along with USDA's responses, and are grouped by the Code of Federal

Regulation (CFR) section numbers to which they apply.

General Comment on BioPreferred Program

Comment: One commenter stated that, given the need for consistency between the two elements of the overall BioPreferred program, and the addition of the ingredients and feedstocks to both elements of the program, USDA should combine both parts of the program into a single program to most effectively effectuate Congressional intent. The commenter recommended that all products that qualify for inclusion in USDA's BioPreferred Catalog should also qualify for Federal procurement preference. The commenter stated that designated product categories of biobased products approved for Federal procurement preference could be used as an organizing guide for the catalog. Having a difference between the list of products that can be labeled and those that are subject to a purchasing preference is confusing. The commenter also stated that, as a corollary, all products approved for procurement should be entitled to use a label. The commenter stated that it would remain entirely voluntary with the manufacturer or seller whether to place a label on the product. The commenter stated that the label has value as a specifying tool, where a government contractor soliciting bids from suppliers can simply require that products be within categories found in the catalog and must bear a label or be qualified to bear a label. The commenter stated that these

changes would be easy to apply, would simplify the program, and would make it more effective.

Response: USDA appreciates the recommendations provided by the commenter. USDA will consider these and other comments that relate to the structure and operation of the BioPreferred program and will, at a later date, evaluate changes that could be made to streamline the program.

A. 7 CFR 3201.1 - Purpose and scope.

No comments were received on the revisions proposed for this section.

B. 7 CFR 3201.2 - Definitions.

Comment: One commenter noted that the terms "distinct materials" and "component" (used in the definition of "complex assembly") have not been defined. The commenter stated that, if USDA continues to pursue the approach of measuring biocontent on a component-by-component basis, the following definition of component would be appropriate: "a component is a homogeneous material in a uniquely identifiable part or piece of an assembled product that a) is required to complete or finish an item; b) performs a distinctive and necessary function on the operation of a system; or c) is intended to be included as part of a finished item." The commenter added that the definition of homogeneous is "uniform composition throughout an item's entirety." The commenter stated that many automotive components

are made of various types of materials including metals that would be included in the component weight if a component were defined as a heterogeneous material. For instance, a seat consists of foam, framework, brackets, buckle mechanisms, fabric, etc. The commenter concluded that because not every part of a seat assembly can be biobased, only the homogeneous materials that can be biobased should be included in the component definition and biobased content calculation.

Response: USDA agrees with the commenter that the recommended definitions may be necessary when designating complex assemblies used within the automotive industry. However, because the Guidelines are the regulatory foundation for the entire program, USDA believes that they need to remain generic and allow flexibility in implementation. In industry-specific situations such as those described by the commenter, the Guidelines definitions can be supplemented on a case-by-case basis by applicable definitions included in the regulatory text for the particular complex assembly being designated.

Comment: One commenter agreed that the definition of "complex assembly" is appropriate, but stated that the proposed rulemaking should provide additional guidance by including examples of complex assemblies. According to the commenter, carpets would fall under the definition of complex assemblies because of their various components, such as the carpet itself,

carpet backing, adhesive, insulation material, etc. Each of these components may be composed of varying levels of biobased materials. The commenter stated that many of these biobased products (components) may meet the biobased content criteria by themselves within the complex assembly definition. However, there will be instances where certain renewable chemicals (such as an enzyme in cleaning fluids), intermediate ingredients or feedstocks may not meet the threshold in the "designated product category." Therefore, it is not clear from the proposed rulemaking whether these biobased products will be accounted for in the final biobased complex assembly products. The commenter stated that more clear guidelines through Federal Register comments are requested for biobased content requirements of complex assembly biobased products.

Response: USDA appreciates the commenter's support of the proposed definition of "complex assembly." With regard to the commenter's example of an enzyme used in a cleaning fluid, USDA points out that a product like cleaning fluid would not be a complex assembly. Cleaning fluids and similar products may contain several ingredients, some of which may be biobased and some of which may not be. In such a product, however, the ingredients are blended together to form a uniform mixture from which a sample can be taken and tested for biobased content using ASTM D6866. Thus, in such a product, each ingredient that

contributes toward the overall biobased content of the product is counted, regardless of the amount.

Comment: One commenter stated that, in the definition of intermediate ingredient or feedstock, USDA should consider further clarification regarding biomaterials that are used as “fillers” (e.g., corn starch, bamboo fiber, etc.). The commenter recommended that these fillers have been adequately “processed” to be distinguished from raw agricultural ingredients and should be part of the designation allowance.

Response: USDA agrees with the commenter that “fillers” used as routine ingredients in biobased products have been adequately processed and should count toward the overall biobased content of the final product. USDA does not consider the role that the various biobased ingredients may play in the formulation of finished products (i.e., carriers, fillers, or inactive ingredients versus active ingredients) when determining the minimum required biobased content. Thus, any biobased material that is an ingredient in the tested product would count toward the reported biobased content of the product.

Comment: Another commenter recommended the following modification to the definition of intermediate ingredient or feedstock:

Intermediate ingredient or feedstock. A material or compound made in whole or in significant part from biological products,

including renewable agricultural materials (including plant, animal, and marine materials) or forestry materials that have undergone ~~a significant amount of~~ value added processing (including thermal, chemical, biological, ~~and~~ *or a significant amount of* mechanical processing), excluding *harvesting* operations, offered for sale by a manufacturer or vendor and that is subsequently used to make a more complex compound or product.

Response: USDA agrees that the commenter's suggested revisions to the proposed definition clarify that the value added processing steps may be thermal, chemical, biological, or mechanical. The definition in the final rule has been revised as suggested by the commenter.

Comment: One commenter suggested amending the definition of "intermediate ingredient or feedstock" by inserting "*(including a renewable chemical)*" after "material or compound." The commenter also suggested adding a definition of "renewable chemical," as follows: "*the term 'renewable chemical' means a monomer, polymer, plastic, formulated product, or chemical substance produced from renewable biomass.*" The commenter stated that these amendments will be consistent with the definitions of "intermediate ingredient or feedstock," and "renewable chemical," as defined in recent legislation in the 112th Congress (viz. S.2155, S.3240, and H.R.5955.)

Response: USDA based the proposed definitions on the language in the 2008 Farm Bill. USDA will re-visit the definitions and other aspects of the BioPreferred program subsequently, given passage of Agricultural Act of 2014.

Comment: One commenter stated that the proposed definition of "intermediate ingredient or feedstock" is inconsistent with both the statutory definition and the definition of the same term in the labeling rule. The commenter stated that the proposed definition conflicts with the statute's definition of the same term, has unintended negative consequences to the program, and should not be adopted. The statute requires only that an intermediate ingredient or feedstock be a qualifying biological material that is "subsequently used to make a more complex compound or product." The commenter stated that USDA is proposing to narrow Congress's definition to materials: "that have undergone a significant amount of value added processing (including thermal, chemical, biological, and mechanical), excluding harvesting operations, offered for sale by a manufacturer or vendor that is subsequently used to make a more complex product." The commenter stated that USDA explains that this narrowing is necessary to distinguish between raw materials and intermediate ingredients or feedstock, so that such raw ingredients will not qualify for government purchases under this program. The commenter further stated that the proposed rule

does not explain why this distinction is necessary, and that the commenter saw no apparent reason. The commenter stated that, in reality, depending on the process and end-product involved, a "raw" forestry or agricultural product may range from many steps removed from the end-product to one step away. The commenter provided the example of a log, produced by harvesting a tree, and processing the tree to remove limbs and cutting the resultant stem to a length deemed suitable for further manufacture into any of a number of products or feedstocks. An example of further processing would be the debarking of the log, slicing it into veneer and gluing the veneer together to make laminated veneer lumber, clearly a more complex product than the log. The commenter stated that in the plain words of the statute, a log is a "forestry material" "that is subsequently used to make a more complex compound or product." Thus, according to the commenter, it should qualify under the statute as an ingredient and that no program advantage or disadvantage is provided by excluding it. In addition, with respect to forestry materials, and in light of the stated goal of advancing rural domestic economic activity through the program, the commenter recommended that USDA reference the categories of forestry sources identified in ASTM D7612-10 to describe forestry ingredients or feedstocks. The commenter stated that reference to this ASTM standard can be useful for manufacturers

seeking to specify standards to suppliers when procuring ingredients or feedstock for the manufacture of biobased products.

Response: For any type of material or product to be "designated" for a procurement preference, there must exist at least two competing versions of that material or product (so that the biobased material may be preferred). In the case of the BioPreferred program, the two competing versions are almost always one that is composed of, or derived from, petroleum-based material and another version in which a substantial percentage of the petroleum-based ingredient is replaced by an ingredient made from renewable biomass. The designation process results in the requirement that Federal agencies give a preference to the competing product made from renewable biomass. In the view of the BioPreferred program, then, a biobased product is generally an alternative to a petroleum-based product that serves the same functional purpose. It follows, therefore, that USDA would not consider "designating for preferred procurement" a category of products for which there is only one "version." For example, it may be possible to produce hydraulic fluid from either crude oil or soybeans. While the two different versions of the hydraulic fluid compete in the marketplace and hydraulic fluid could be "designated" to give a procurement preference to the soybean-derived version, the crude oil and the soybeans do not directly

compete with each other within the marketplace and neither would be "designated" by the BioPreferred program. Likewise, USDA does not believe that a bale of cotton or a log are items that should be designated for preferred procurement. However, once the barrel of crude oil or the bale of cotton or the log undergo various processing steps, the resulting materials enter the marketplace as intermediate ingredients or feedstocks and compete for selection as the building blocks for the manufacture of consumer-use products. The biobased version of these competing intermediate ingredients or feedstocks would then be candidates for designation, as would the finished products manufactured from them. USDA recognizes and agrees that the number and extent of the "processing steps" can vary depending on what the raw materials and the finished products are. However, USDA continues to believe that the definition of an intermediate ingredient or feedstock should exclude harvested commodities such as raw cotton, soybeans, and logs.

USDA also notes that, in response to the Agricultural Act of 2014, it will make additional revisions to the Guidelines in subsequent rulemaking.

C. 7 CFR 3201.3 - Applicability to Federal procurements; and 7 CFR 3201.4 - Procurement programs.

No comments were received on the revisions proposed for these sections.

D. 7 CFR 3201.5 - Category designation.

Comment: One commenter questioned whether setting a minimum biobased content for each intermediate ingredient or feedstock category is needed. The commenter stated that what is most critical is the total biobased content of the product in which the intermediate ingredient or feedstock is used.

The commenter stated that the FCEA requires that a minimum biobased content be established to designate intermediate ingredients and feedstocks and that the FCEA further requires the USDA to automatically designate finished products composed of designated intermediate ingredients and feedstocks, if the content of the designated intermediate ingredients and feedstocks exceeds 50 percent of the product (unless the Secretary determines a different composition percentage is appropriate). The commenter stated that these FCEA requirements are then interdependent. According to the commenter, the net effect appears to create an entirely different, and potentially conflicting, route to finished product designation. The commenter provided the following example; assume USDA establishes a minimum biobased content for designated intermediate category "polyolefin resins" at 50 percent. If a polyolefin has 100 percent biobased content, then this polyolefin would be a designated intermediate. Next consider a blend consisting of 60 percent of this designated polyolefin

intermediate with 40 percent of fossil-based polyolefin. Finished products made with the blend would be "automatically designated" because the blend contains at least 50 percent of a designated intermediate. Now suppose a manufacturer of non-woven fabrics makes "erosion control materials" of this blend - these products would be automatically designated based on the proposal in this Federal Register notice. The commenter next stated that the minimum biobased content for "Erosion Control Materials" was established as 77 percent. The commenter stated that the current proposal would automatically designate and allow a product with 60 percent biobased content to be designated even though it is below the 77 percent minimum content required for finished product designation of "erosion control materials."

Another commenter also disagreed with the concept of "automatic designation" for finished products, agreeing with the first commenter that this represents a separate and potentially conflicting route to designation of finished products. The commenter provided, as another example, a finished product formulated with 50 percent of a designated biobased intermediate, said intermediate having 20 percent biobased content, then the net biobased content of the finished product is only 10 percent. The commenter stated that this is well below the minimum biobased content established for many of the

product categories. The commenter recommended that all finished products be subject to the minimum biobased content established for the relevant product category. The commenter stated that there should not be an alternative "automatic designation" process, as such an alternative process would merely cause confusion and potentially harm the credibility of the BioPreferred program.

The first commenter recommended a more streamlined approach for the USDA to simply "approve" biobased intermediates which meet the following criteria: a) they have "undergone significant value-adding processing," and b) the biobased content is quantitatively reported with adequate supporting data. The commenter further recommended that the biobased content is reported and has supporting documentation (i.e., ASTM D6866). The commenter stated that it is reasonable for the supplier of these intermediate ingredients and feedstocks to be responsible for applying for and obtaining designation for these materials. Then the finished product manufacturers could calculate and report their biobased content as described elsewhere in the proposal.

The commenter acknowledged the challenges of changing the requirements of the FCEA but stated that the BioPreferred program may want to wait until the FCEA requirements have been amended, and then launch a more streamlined and consistent

method of handling intermediates, rather than launch a potentially flawed method now.

Lastly, the commenter stated that the FCEA requires use of the terminology "designate" with respect to intermediate ingredients and feedstocks. However the commenter stated that use of this term is confusing because the BioPreferred program also "designates" finished products that are directly available for Federal procurement. To avoid confusion, the commenter recommended that USDA may want to consider use of alternative terminology, such as "approved."

Response: The commenter questioned the need to set minimum biobased contents for intermediate ingredients or feedstocks but then, correctly, pointed out that the FCEA specifies that USDA set such minimum contents. USDA intends to continue to evaluate and establish the minimum biobased content for each designated product category on a case-by-case basis.

USDA evaluated the commenter's statements that the current requirements of the FCEA create potentially conflicting routes to finished product designation and believes that such conflicts can be avoided. USDA has always considered that the term "designated" applies to a generic grouping of biobased products that is eligible for the procurement preference. Thus, individual products are not designated and are not eligible for the procurement preference unless they meet the definition of

(and, therefore, are included within) a designated product category. When setting the minimum biobased content for a designated product category, USDA typically considers the biobased content of several representative products that fall within the product category and selects the level found to be appropriate. The selected minimum level is usually not based on the lowest or the highest biobased content among the products. Rather, the selected minimum is considered typical of products within the category. USDA expects this same process to be followed when designating finished products made from designated intermediate ingredients or feedstocks. Thus, individual finished products will be required to meet the minimum biobased content that is established for whatever product category the product falls within.

With regard to the commenter's example of a polyolefin resin, if such an intermediate ingredient or feedstock material were designated, USDA would investigate and consider for designation those finished product categories (not individual products) that could be made from the intermediate. If the intermediate ingredient were used by a manufacturer of erosion control materials, the applicable minimum biobased content for the product would still be 77 percent because that product category has already been designated and there are individual products available that meet the 77 percent. The product

described by the commenter would fall into the designated product category of "erosion control materials" but would not be eligible for preferred procurement. The final rule has been revised to clarify that when final products made from intermediate ingredients fall within an existing designated product category, those products are subject to the minimum biobased content and other established criteria for the applicable product category.

If, on the other hand, a manufacturer used the designated polyolefin intermediate to manufacture a product that does not fall into an already-designated product category, USDA would move to designate a new product category based on that product and that product's biobased content (along with the biobased content of other products that fall within the new designated product category) would be considered when setting the minimum biobased content for the new designated product category.

Response: USDA points out that the use of the term "designate" is consistent with the language in the FCEA. In addition, once an intermediate ingredient or feedstock category is designated by rulemaking, Federal agencies would have the same legal obligation to purchase the biobased version of products within the category as they do when purchasing products within designated finished product categories. USDA acknowledges that such purchases of designated intermediate

ingredients or feedstocks by Federal agencies may rarely occur, but the obligation to give a preference to the biobased version of these materials, if they are ever purchased, would still apply.

Comment: One commenter expressed concern about how USDA will determine what is a "generic grouping" under the proposed definition of "*designated intermediate ingredient or feedstock category*." The commenter stated that groupings could be broad, such as vegetable oils, fibers, resins, polymers, polyols, polyesters, etc., or the groupings could be more narrow such as soybean oil (including crude, refined, deodorized, epoxidized). The commenter further stated that it is critical that USDA seek extensive industry input on how best to define "generic groupings" prior to proposing categories for designation. Groupings should take into account the chemical structure of a material or compound as well as functionality and end-use applications. The commenter recommended that USDA establish a process through its website and stakeholder meetings to solicit nominations for intermediate ingredients and feedstocks that should be considered for designation prior to issuing proposed rulemakings. This would allow USDA to view the range of commercially available biobased intermediate ingredients and feedstocks and sort them by chemical class, functionality, and end use application to best determine how to establish

"groupings" for the purpose of designations. The commenter stated that USDA should remain flexible about how narrow or broad to make the "groupings" until it has solicited and carefully evaluated information from industry stakeholders. The commenter also stated that USDA should establish a process whereby final product categories not designated as part of the initial intermediate ingredient and feedstock rulemaking have the opportunity to petition for inclusion at a later date.

Response: USDA appreciates the commenter's recommendations and agrees that extensive industry input will be critical for the success of the program. USDA believes that the BioPreferred Program Guidelines, as being finalized in this rulemaking, establishes a framework whereby USDA can work in conjunction with stakeholders to implement the requirements of the FCEA.

Comment: One commenter acknowledged that the USDA will establish a minimum biobased content for each intermediate category, entirely analogous to how it establishes a minimum biobased content for each finished product category. The commenter then pointed out that this could effectively double the effort needed to manage the BioPreferred program, with minimal benefit. Rather, the commenter recommended that the USDA establish one minimum biobased content for all ingredients and feedstocks. This universal minimum should be high enough to be meaningful, to represent a real technical advance. The

commenter stated that it is obviously more challenging to make biobased some classes of materials as compared with others, so the minimum should not be so high as to rule out many deserving materials in these more challenging areas. The commenter recommended that a universal minimum biobased content of 20 percent strikes the right balance.

Response: USDA disagrees with the concept of setting a "universal" minimum biobased content. Setting the minimum biobased content of categories on a case-by-case basis, as has been done since the program began, allows flexibility to address both those categories that can be formulated with very high biobased contents and the "more challenging" areas mentioned by the commenter. USDA believes there are numerous intermediate categories where the commenter's recommended 20 percent minimum biobased content would be significantly below what is achievable.

Comment: One commenter stated that limits of certain performance applications or compliance with federal specifications in some end-use applications may not allow for the final product to contain 50 percent of the biobased material. This lower limit should be considered case by case.

Response: As discussed in the previous response, USDA expects that minimum biobased content requirements will continue to be set on a case-by-case basis as they have in the past by

considering the availability, performance, and cost of representative products within each product category being evaluated for designation.

Comment: USDA received numerous comments on the proposed revision to replace the "mature market" exclusion in paragraph 3201.5(c)(2) with language proposed to be added as a new paragraph (b)(2) stating USDA's intention to "designate for preferred procurement those product categories and intermediate ingredient or feedstock categories that are determined to create new and emerging markets for biobased material." Some of the comments were in agreement with the proposal, but most opposed both the original language in the paragraph and the proposed revision. The consensus among those opposed to either the original paragraph 3201.5(c)(2) or the text proposed to be added as paragraph (b)(2) is that the date of entry into the marketplace and extent of national market penetration should not be a factor in determining whether a product category is designated for preferred procurement.

Response: The Agricultural Act of 2014, signed by the President on February 7, 2014, includes new provisions that effectively remove both the "mature markets" and the proposed "new and emerging markets" considerations when designating product categories and intermediate ingredient or feedstock categories. USDA has decided that in this final rule the

proposed new language for paragraph 3201.5(b)(2) will be dropped and the paragraph will be reserved. USDA is today announcing its intention to develop rulemaking actions to propose and promulgate another final rule amending the Guidelines to incorporate the appropriate new language into paragraph 3201.5(b)(2).

Comment: One commenter stated that the deletion of the mature markets exclusion from 3201.5(c)(2) must be carried into the USDA Voluntary Labeling Program. The authorizing statute requires USDA to maintain consistency between the two programs.

Response: As discussed in the response to the previous comment, the Agricultural Act of 2014 removed the exclusion of products that are considered to be mature market products. USDA intends to proceed with two new rulemaking activities in response to the provisions of the Agricultural Act of 2014; one proposing additional amendments to the Guidelines and one proposing corresponding amendments to the voluntary labeling rule.

Comment: One commenter stated that the current proposed rule does not fit the needs or technical requirements for the automotive sector. The commenter stated that the fundamental equation proposed for determining biobased content in automobiles will not work for vehicles as the denominator cannot be standardized and will not remain a fixed number. The

commenter also stated that there are further deficiencies in the proposal with lack of definitions for key terms and concepts. The commenter stated that the proposed use of the ASTM method for determining biobased content is not practical for the automotive applications. The commenter concluded that it is not clear what alternative proposals might look like given the lack of definition and uncertainty of technical criteria, the rapid changes in automotive materials technologies, feedstocks, sources, availability of materials, and infrastructure to manage the materials.

Response: USDA agrees with the commenter that the designation of product categories within the automotive industry will be difficult. USDA also agrees that at this stage in the evolution of the BioPreferred program the designation of an automobile as a complex assembly would be extremely difficult. USDA has no plans to attempt such a designation within the immediate future. USDA expects that when complex assemblies such as those found in the automobile industry (and many others) are designated, case-by-case alternative equations may be necessary. At this point in the process of considering the designation of complex assemblies, it is not possible to anticipate all cases where an exception to the generic process adopted today may be needed.

USDA does expect, however, that some automotive components,

and the biobased intermediate ingredients and feedstock used to make those components, will be designated within the next few years. Biobased intermediate ingredients that could be used to make products such as carpets and carpet backing, upholstery fabrics or headliners, and foam that might be used in automobile seats are expected to be evaluated for designation soon. USDA believes that with the cooperation of the manufacturers the designation of products such as these can be accomplished. USDA points out that a parallel to the automobile example would be a house or office building where components such as carpets, plastic insulating foam, composite panels, and interior paints have been designated by the BioPreferred program but the actual house or office building has not.

E. 7 CFR 3201.6 - Providing product information to Federal agencies.

No comments were received on the revisions proposed for this section.

F. 7 CFR 3201.7 - Determining biobased content.

Comment: One commenter stated that the proposed methodology for determining biobased content of products based on intermediates could use some additional requirements. Testing should still be required on these materials to ensure the biobased content is truly what is claimed. The testing fee for procurement is very inexpensive compared to other

certification programs and the rules that are currently in place as far as changes in formulations and products similar to compositions that already have certification cuts down on multiple testing fees. Another alternative could be to develop simpler test methods based on NMR data/IR spectra to determine the amount of a specific biobased material in a complex mixture.

Response: While the voluntary labeling program requires independent testing to confirm the biobased content of products for which certification is sought, the preferred procurement program requires only that manufacturers certify the claimed biobased content. However, the Guidelines (at 3201.7(a)) require that manufacturers must provide information to verify the biobased content of products offered for preferred procurement if such verification is requested by USDA or other Federal agencies. Section 3201.7(c) states that verification of biobased content must be based on third party testing using ASTM D6866. Also, as part of the designation process, USDA routinely obtains and tests several representative products from the product categories being designated. USDA agrees that documenting the biobased content of intermediate ingredients or feedstocks, as well as finished products, is critical to the success of the program. USDA plans to increase the effort applied to confirming manufacturers' biobased content claims, as resources allow. Also, efforts to develop alternative test

methods are continuing and USDA will consider allowing the use of an alternative method once it has been approved by a certifying entity such as ASTM.

Comment: One commenter stated that, in the proposed rule, USDA does not address the documentation required to support the calculated biobased content of the finished product. The commenter stated that, logically, the finished product manufacturer applying for designation would disclose the full formulation to USDA, including suppliers of these ingredients. The commenter further stated that it is reasonable that the suppliers of ingredients would provide documentation supporting the biobased content of that ingredient. According to the commenter, such documentation may present a potential issue regarding confidential business information (CBI). The commenter proposed the following two options for consideration by USDA in cases where the manufacturer wishes to protect CBI:

- a) Including "undisclosed ingredients" in the formulation - the manufacturer could not claim any contribution toward overall biobased content from these ingredients because the biobased content of those ingredients would not be verifiable; and, b)
- Claiming biobased content contributions from "undisclosed ingredients" - if the manufacturer wanted to claim contributions from such undisclosed ingredients toward overall biobased

content, the manufacturer would have the option of paying for and having ASTM D6866 performed on the finished product itself.

Response: USDA disagrees that the submission of confidential product formulation data would be necessary under the BioPreferred program. Section 3201.7(a) requires that manufacturers must certify that their product meets the minimum biobased content requirements for the designated product category. Thus, the requirement to certify the biobased content of a product does not involve the submission of specific formulation data, confidential or otherwise. The section further states that manufacturers must, upon request, provide USDA and Federal agencies information to verify the biobased content for products certified to qualify for preferred procurement. Section 3201.7(c) states that verification of biobased content must be based on third party testing using ASTM D6866. Because intermediate ingredients or feedstocks, and the finished products made from them, can be tested using ASTM D6866, it is expected that test results would be submitted as verification of biobased content. No specific formulation data would be required or expected.

Comment: One commenter expressed concern about the procedure that USDA is proposing for determining the biobased content of final products made with intermediate ingredients and feedstocks. The commenter stated that USDA's proposed approach

is not consistent with the statutory language. The commenter stated that the statutory language is clear that products composed of more than 50 percent (or a different percentage as determined by USDA) of the designated intermediate ingredient or feedstock must be automatically designated. The commenter stated that the statute does not direct USDA to take into account the biobased percentage content of the designated intermediate ingredient or feedstock when calculating the 50 percent. According to the commenter, if a final product contains 50 percent by mass weight of a designated intermediate ingredient or feedstock, the final product should also be designated even if the designated intermediate ingredient or feedstock has a biobased content of less than 100 percent. Also, if a final product contains more than one designated intermediate ingredient or feedstock then the mass weight of each should be added together to determine if the overall content reaches 50 percent or more. The commenter also stated that to be consistent with the intent of the statute and the BioPreferred Program Guidelines, the mass weight calculation should be based on organic carbon content only and not other materials in the final product such as water or inorganic materials.

The commenter recommended the following modification to proposed section 3201.7 (c)(2): *Final products composed of*

designated intermediate ingredient or feedstock materials. The biobased content of final products composed of designated intermediate ingredient or feedstock materials will be determined by ~~multiplying the percentage by weight (mass) of each intermediate ingredient or feedstock material in the final product times the percentage of biobased content of each intermediate ingredient or feedstock material,~~ calculating the percentage by weight (mass) that each designated intermediate ingredient or feedstock material represents of the total organic carbon content of the final product and summing the results (if more than one designated intermediate ingredient or feedstock is used). ~~, and dividing the resultant value by 100.~~

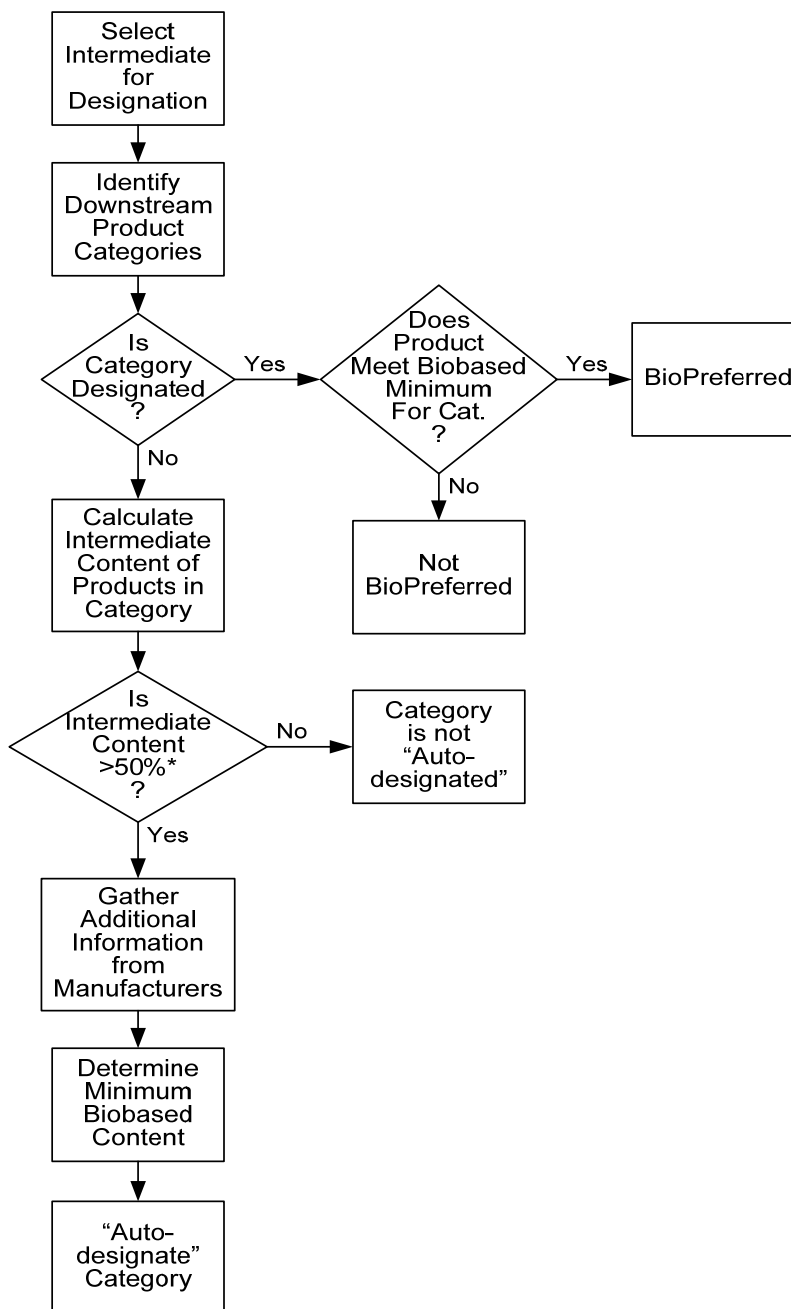
Another commenter stated that the text and equations in 3201.7(c)(2) and (3) need to be revised. The commenter stated that the calculation should be based on the organic carbon content of the product and provided a recommendation for a revised equation.

Response: USDA evaluated the comments and recommendations submitted by these commenters and agrees with most of their positions. Most significantly, USDA agrees that the equations presented in the proposed amendments to the Guidelines should be revised so that they determine the biobased content of complex assemblies and finished products made from designated intermediate ingredients or feedstocks based on the total mass

of organic carbon in the components of the assembly or in the finished product. The equations have been revised in today's final rule.

The first commenter is correct that the statutory language in the FCEA states that products composed of more than 50 percent of designated intermediate ingredients or feedstocks must be automatically designated. However, USDA believes that the current approach of designating "product categories" rather than individual products is appropriate even when finished products are made from intermediate ingredients that have been designated. The designation of product categories that include these finished products involves multiple steps. These steps are shown in Figure 1 and are discussed in the paragraphs that follow Figure 1.

Process for “Auto-designating” Biobased Product Categories Derived from Designated Intermediates



* Or such other amount as the Secretary determines appropriate.

Figure 1. Automatic Designation Process Flow Chart

First, at the time that an intermediate ingredient or feedstock category is selected for designation, the categories of finished products that are made from the intermediate ingredients or feedstocks will be identified. The list of product categories that is developed will then be compared to the list of previously designated product categories. For those individual products that fall within a product category that has already been designated, the applicable minimum biobased content to qualify for preferred procurement is the minimum specified for the product category in subpart B of section 3201. Those individual products that do not fall within an existing designated product category will be investigated to determine whether their formulation includes more than 50 percent¹ of the intermediate ingredients or feedstocks selected for designation. If the products contain more than 50 percent¹ of the selected intermediates, USDA will proceed with "auto-designating" a new product category based on the products evaluated. If new product categories are needed, USDA will gather information on as many individual products from within the new product category as possible. Biobased content information from the testing of individual products (using ASTM D6866) will be evaluated and a minimum biobased content set for the new product category. Then, after the designation of the new product category (based

¹ Or such other amount as the Secretary determines appropriate.

on products composed of more than 50 percent designated intermediate ingredients), manufacturers can determine whether their individual products qualify for preferred procurement. They can do this by using the procedure in the final Guidelines to determine the biobased content of their products and comparing that to the minimum biobased content established for the product category.

As stated above, the equations for determining the biobased content of complex products and finished products was revised in the final rule. The first commenter's recommended revision to the procedure for calculating the biobased content of finished products made from designated intermediate ingredients was generally accepted. However, a second sentence was added to the procedure because when determining whether an individual finished product meets the established minimum biobased content of a product category, biobased intermediate ingredients that have not been designated may also be present and should be included in the determination of the total biobased content of the product.

Comment: One commenter stated appreciation for USDA's intent that the biobased content of complex assemblies reflects only that portion of the entire assembly that has the potential to be biobased. However, the commenter expressed concern with the use of vague terms such as "potentially" biobased as its use

does not clarify who or what entity will make the determination as to what is potentially biobased. The commenter suggested that use of the term "organic carbon" is a more precise and scientifically valid term to identify components which are potentially biobased. According to the commenter, use of this term also has the benefit of congruence with the terminology used in ASTM D6866.

The commenter expressed doubts as to whether reporting only the percentage of organic carbon that is biobased is sufficient to drive the desired behaviors that USDA seeks. The commenter stated that many beneficial innovations in complex assemblies entail replacing glass, steel, etc. with advanced polymer resins and composites. This modification has the effect of increasing the overall organic carbon content of the assembly, but because it increases the denominator of the complex assembly calculation, could decrease the calculated biobased content and be counterproductive. The commenter recommended that two metrics be reported for complex assemblies: a) the weight percent of the entire assembly which is organic carbon, and b) the percentage of that organic carbon that is biobased. The commenter stated that designation of complex assemblies should be based on some combination of these two metrics, in such a way to incentivize increased organic carbon content and increased percentage of that organic carbon that is biobased.

The commenter also recommended that when determining the total biobased content of complex assemblies, all materials that have biobased content should be included in the calculations and not just those materials that meet a USDA proposed minimum biobased content. The commenter provided as an example a complex assembly that is construed from other "finished products" (i.e., subassemblies) that are part of the BioPreferred catalog and have minimum biobased content levels set per the catalog. The commenter recommended that even if the subassemblies do not meet the minimum biobased content per the BioPreferred catalog, they should still be included in the calculation as contributing to the overall biobased content. The commenter stated that such inclusion will: a) provide a higher level of accuracy when determining total biobased content of a complex assembly, and b) be consistent with USDA's emphasis "to improve demand for biobased products" and "to spur development of the industrial base through value-added agricultural processing and manufacturing."

Response: USDA agrees with several commenters who recommended using "total organic carbon" as the basis for determining biobased content and has revised the procedures accordingly. This eliminates the need to consider whether materials or components have the potential to be biobased. USDA also agrees with the commenter that all biobased material in a

component should be included when determining the biobased content. The calculation procedure does not distinguish between components that "finished products" and those that are not, so all biobased content in a complex assembly is counted.

Comment: One commenter stated that they are concerned about how USDA will reliably determine which individual components "could" contain biobased material. The commenter urged USDA to establish a process through its website as well as through stakeholder meetings to solicit nominations for which complex assemblies should be considered for designation and to collect available information on components that are being made with biobased materials. In terms of components that "could" contain biobased materials, the commenter urged USDA to only include components for which there are commercially available biobased alternatives that meet relevant industry performance standards.

Response: USDA has revised the procedures to eliminate the need to determine whether components "could" contain biobased material. However, USDA agrees with the commenter that stakeholder involvement is critical to the designation of complex assemblies. USDA expects that there will be extensive efforts to gather information and opinions from stakeholders. USDA also agrees that commercial availability of biobased components that meet relevant industry performance standards is

an essential criteria that must be met.

G. 7 CFR 3201.8 - Determining life cycle costs, environmental and health benefits, and performance.

Comment: Numerous commenters provided opinions on whether, and to what extent, life cycle analysis (LCA) requirements should be included in the designation process for biobased products. Three commenters stated that USDA should retain the requirement for an LCA to assure that qualified products are appropriate for preferred procurement and labeling. One of the commenters stated that without the LCA, USDA risks approving products that may have detrimental qualities that the Federal government would not want to support. The second commenter stated that LCA requirements are critical to assure that USDA does not continue to place products onto the BioPreferred catalogue that do not demonstrate better environmental or health benefits than their non-biobased competitors. The third commenter stated that LCA is necessary to provide transparency in the USDA's evaluation of biobased content and that the assessment provides assurance that products in the Biobased Market program demonstrate substantial environmental benefits compared to alternative products. The commenter noted that the USDA Forest Service supports the use of LCA as a tool to identify materials that reduce environmental burdens and urged OPFM to follow their lead by maintaining the LCA requirement as

part of the Biobased Market program.

One commenter recommended that USDA reconsider the "voluntary" approach to the development of LCA data and information. According to the commenter, LCA information is critical to understanding the full range of environmental impacts from product content or material substitution. The commenter also stated that LCA data inform agencies of the unseen or unanticipated costs and benefits from making preference selections based solely on biobased or non-biobased content. The commenter stated that LCA data help better inform interagency review, and provide critical information needed by other agencies, particularly those agencies with regulatory authority over greenhouse gas emissions and other environmental impacts related to material substitution. The commenter also stated that LCA data provide benchmarked and updated data so agencies can more effectively perform regulatory look-back. According to the commenter, the President made clear in Executive Order 13563 (Jan. 21, 2011) that regulatory agencies "must measure, and seek to improve, the actual results of regulatory requirements." The order emphasizes the importance of retrospective analysis of rules with a "look back requirement," so the agency can, in effect, better engage in ongoing cost-benefit analysis of the regulation after it is promulgated. An LCA requirement is critical because it helps

provide the data and information necessary to complete that review.

The commenter stated that, while some argue that requiring the submission of LCA data and information is unfair or imposes additional costs on biobased manufacturers, the FCEA and the Guidelines acknowledge that the beneficiaries of the biobased preference are generally expected to gain market share compared to those who do not. The commenter supported the application of an LCA requirement on an equal basis with respect to any Federal procurement program premised on the notion that certain material content preferences are preferred over others, and with respect to any supplier.

One commenter requested further clarity on LCA requirements for "complex assembly" biobased products. The commenter stated that it is not clear from the proposed rulemaking whether complex assemblies will require their own LCA, or whether LCAs for the individual components with biobased content will suffice, for example. The commenter recommended further guidelines for complex assemblies be published in the Federal Register for public comment. The commenter further stated that harmonization and alignment of product carbon footprint (PCF) standards need to be developed. The commenter stated that several standards (ISO 14067, GHG protocol, and PAS 2050) are being developed in parallel and that it is important that their

approach and principles be consistent with one another and with generally accepted LCA guidance, such as ISO 14040/14044, and the International Reference Life Cycle Data System (ILCD) handbook. The commenter stated that discrepancies between PCF and LCA methods will cause confusion, waste resources and hinder the acceptance of PCF results.

One commenter stated that the inclusion of LCA considerations would provide additional information to the BioPreferred program, but that it also would add enormous complexity and cost to participating companies. The commenter stated that the type of LCA needed will vary depending upon whether the item being studied is an intermediate or a finished product as well as what end-of-life options are possible. Currently, ample industry forces are driving toward reduced environmental impact, and many manufacturers are voluntarily conducting LCAs to augment their marketing messaging. The commenter recommended that the USDA not codify LCA requirements into the BioPreferred program but, rather, incorporation of this information should be voluntary.

One commenter stated that the BioPreferred program should encourage the development of LCAs using ASTM/ISO methodology but not mandate or require it for procurement. The commenter stated that it is a useful tool to document continual environmental process improvements but that an LCA alone is not a sufficient

tool to tell you if a product is on its way to being sustainable. The commenter explained that the fundamental value of biobased plastics arises from using biomass carbon feedstock in place of petro-fossil carbon feedstock.

One commenter stated that it is important that USDA consider the burden that providing life cycle information may place on suppliers of finished products. The commenter stated that it is reasonable that the suppliers of ingredients and feedstocks provide LCA information and data, while finished product suppliers might do so on a voluntary basis where it is reasonable to do so.

The commenter stated that information about costs over the full life cycle (including operating costs and environmental impacts) is an important consideration. The commenter stated that a UNEP/SETAC publication notes the role of such data in procurement decisions: "[L]ife cycle costing as a technique to calculate and manage costs, especially for large investments has been used to support decision-makers in procurement for decades...". The commenter stated that cost information is needed to verify that the qualifications for procurement awards have been met and may confirm whether the qualified biobased product is reasonably priced in comparison. The commenter further stated that the Guidelines should also encourage the preparation of the potential cost impacts of material substitution that

could result from the procurement preference, including an analysis of commodity price trends.

Response: In the original Guidelines, manufacturers were required, under section 3201.8(a), to provide life cycle cost information from either a BEES analysis or a similar analysis using ASTM D7075 when such information was requested by a Federal agency. In the 2008 Farm Bill, Congress included language stating the Federal agencies could not, as a condition of purchase of a biobased product, require manufacturers or vendors of biobased products to provide to procuring agencies more data than would be required to be provided by other manufacturers or vendors offering products for sale. As a result of this language in the 2008 Farm Bill, USDA previously amended section 3201.8 (76 FR 6322) to eliminate this requirement. While Federal agencies may no longer require such information from manufacturers of biobased products, USDA believes that information from LCA developed using industry-accepted approaches, such as the ASTM D7075 standard or the BEES analytical tool, will be valuable in the marketing of biobased products. USDA also believes that the availability of LCA information may be valuable in Federal procurements that take into account human health, environmental, or disposal considerations in the product selection process. Therefore, while USDA does not have the authority to require LCA data, USDA

has, in today's final rule, added the proposed language to paragraph (a) encouraging stakeholders to develop and provide information on environmental and public health benefits, including life cycle costs, associated with their biobased products.

Comment: One commenter stated concern that the term "relative price" in section 3201.8 is an entirely new concept and that the term suggests that a government agency has the authority to use the data to adjust the market, negotiated, or contracted price of a product to a "relative price." The commenter stated that the use of the term is inappropriate, problematic, and confusing and that USDA should retain the original wording of this section ("determining life cycle costs, environmental and health benefits, and performance").

Response: USDA agrees with the commenter that the term "relative price" is not appropriate in this situation. USDA does believe, however, that providing some information on the price of products is useful to purchasers as they consider whether biobased products meet their purchasing criteria. USDA still encourages manufacturers to provide information to prospective buyers on the price of their products, either on the BioPreferred web site or in their marketing material. In the final rule, USDA has dropped the word "relative" from the title of section 3201.8 and from the text within the section.

H. 7 CFR 3201.9 - Funding for testing.

No comments were received on the revisions proposed for this section.

VI. Regulatory Information

A. Executive Orders 12866 and 13563: Regulatory Planning and Review

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action" under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

1. Need for the Rule

Today's final rule amends the BioPreferred Program Guidelines to establish the regulatory framework for the designation of complex assemblies and intermediate ingredients or feedstocks for Federal procurement preference. The designation of such products is specifically required under the Food, Conservation, and Energy Act of 2008, which states that:

"(B) Requirements. - The guidelines under this paragraph shall

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(i) designate those items (including finished products) that are or can be produced with biobased products (including biobased products for which there is only a single product or manufacturer in the category) that will be subject to the preference described in paragraph (2);

(ii) designate those intermediate ingredients and feedstocks that are or can be used to produce items that will be subject to the preference described in paragraph (2);

(iii) automatically designate items composed of intermediate ingredients and feedstocks designated under clause (ii), if the content of the designated intermediate ingredients and feedstocks exceeds 50 percent of the item (unless the Secretary determines a different composition percentage is appropriate)."

2. Benefits

We expect that this final rule will result in benefits that justify its cost, but we lack the information to quantify those benefits. This rule expands the scope of products that may be considered for Federal procurement preference. The eligibility of intermediate ingredients or feedstocks and complex assemblies is expected to increase demand for these products once designated, which, in turn, is expected to increase demand for

those agricultural products that can serve as ingredients and feedstocks. This Federal procurement preference will thus benefit businesses producing these ingredients and feedstocks.

3. Costs

The anticipated costs of this action would stem from reduced demand for products that do not receive Federal Procurement Preference designation. Producers of ingredients and feedstocks that are not so designated could face a loss of market share within Federal procurement; however, this cost to some producers is a result of implementing the provisions of the statute.

Although today's final rule establishes procedures for designating qualified biobased product categories, no product categories are proposed to be designated today. The actual designation of biobased product categories under this program will be accomplished through future rulemaking actions and the effect of those rulemakings on the economy will be addressed at that time.

B. Regulatory Flexibility Act (RFA)

The RFA, 5 U.S.C. 601-602, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant

economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

Although the BioPreferred program ultimately may have a direct impact on a substantial number of small entities, USDA has determined that today's final rule itself does not have a direct significant economic impact on a substantial number of small entities. This rule directly affects Federal agencies, which are required to consider designated products for purchase. In addition, private sector manufacturers and vendors of biobased products voluntarily may provide information to USDA through the means set forth in this rule. However, the rule imposes no requirement on manufacturers and vendors to do so, and does not differentiate between manufacturers and vendors based on size. USDA does not know how many small manufacturers and vendors may opt to participate at this stage of the program.

As explained above, when USDA issues a proposed rulemaking to designate product categories for preferred procurement under this program, USDA will assess the anticipated impact of such designations, including the impact on small entities. USDA anticipates that this program will positively impact small entities that manufacture or sell biobased products. For example, once product categories are designated, this program will provide additional opportunities for small businesses to

manufacture and sell biobased products to Federal agencies. This program also will impact indirectly small entities that supply biobased materials to manufacturers. Additionally, this program may decrease opportunities for small businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. It is difficult for USDA to definitively assess these anticipated impacts on small entities until USDA proposes product categories for designation. This rule does not designate any product categories.

C. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights

This final rule has been reviewed in accordance with Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and does not contain policies that have implications for these rights.

D. Executive Order 12988: Civil Justice Reform

This final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. This rule does not preempt State or local laws, is not intended to have retroactive effect, and does not involve administrative appeals.

E. Executive Order 13132: Federalism

This final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The provisions of this rule do not have a

substantial direct effect on States or their political subdivisions or on the distribution of power and responsibilities among the various government levels.

F. Unfunded Mandates Reform Act of 1995

This final rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538, for State, local, and tribal governments, or the private sector. Therefore, a statement under section 202 of UMRA is not required.

G. Executive Order 12372: Intergovernmental Review of Federal Programs

For the reasons set forth in the Final Rule Related Notice for 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), this program is excluded from the scope of the Executive Order 12372, which requires intergovernmental consultation with State and local officials. This program does not directly affect State and local governments.

H. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this proposed regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

I. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 through 3520), the information collection under the Guidelines is currently approved under OMB control number 0503-0011.

J. E-Government Act Compliance

USDA is committed to compliance with the E-Government Act, which requires Government agencies, in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. USDA is implementing an electronic information system for posting information voluntarily submitted by manufacturers or vendors on the products they intend to offer for Federal preferred procurement under each designated item. For information pertinent to E-Government Act compliance related to this rule, please contact Ron Buckhalt at (202) 205-4008.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as

added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, that includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. USDA has submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register.

List of Subjects in 7 CFR Part 3201

Biobased products, Procurement

For the reasons stated in the preamble, the Department of Agriculture is amending 7 CFR chapter XXXII as follows:

Chapter XXXII - Office of Procurement and Property Management
PART 3201 - GUIDELINES FOR DESIGNATING BIOBASED PRODUCTS FOR
FEDERAL PROCUREMENT

1. The authority citation for part 3201 continues to read as follows:

Authority: 7 U.S.C. 8102.

2. Section 3201.1 is amended by revising paragraph (b) to read as follows:

§ 3201.1 Purpose and scope.

* * * * *

(b) Scope. The guidelines in this part establish a process for designating categories of products that are, or can be, produced with biobased components and materials and whose procurement by procuring agencies and other relevant stakeholders will carry out the objectives of section 9002 of FSRIA. The guidelines also establish a process for designating categories of intermediate ingredients and feedstocks that are, or can be, used to produce final products that will be designated and, thus, subject to Federal preferred procurement. The guidelines also establish a process for calculating the biobased content of complex assembly products, whose biobased content cannot be measured following ASTM Standard Method D6866,

and for designating complex assembly product categories.

3. Section 3201.2 is amended by:

a. Revising the definitions of "BEES" and "Biobased product";

b. Adding, in alphabetical order, definitions for "Complex assembly" and "Designated intermediate ingredient or feedstock category";

c. Removing the definition of "Designated item";

d. Adding, in alphabetical order, definitions for "Designated product category" and "Intermediate ingredient or feedstock";

e. Revising the definition of "Procuring agency"; and

f. Adding, in alphabetical order, definitions for "Qualified biobased product" and "Relevant stakeholder".

The revisions and additions read as follows:

§ 3201.2 Definitions.

* * * * *

BEES. An acronym for "Building for Environmental and Economic Sustainability," an analytic tool used to determine the environmental and health benefits and life cycle costs of products and materials, developed by the U.S. Department of Commerce National Institute of Standards and Technology.

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Biobased product. A product determined by USDA to be a

commercial or industrial product (other than food or feed) that is:

(1) Composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials and forestry materials; or

(2) An intermediate ingredient or feedstock.

* * * * *

Complex assembly. A system of distinct materials and components assembled to create a finished product with specific functional intent where some or all of the system inputs contain some amount of biobased material or feedstock.

Designated intermediate ingredient or feedstock category.
A generic grouping of biobased intermediate ingredients or feedstocks identified in subpart B of this part that, when comprising more than 50 percent (or another amount as specified in subpart B of this part) of a resultant final product, qualifies the resultant final product for the procurement preference established under section 9002 of FSRIA.

Designated product category. A generic grouping of biobased products, including those final products made from designated intermediate ingredients or feedstocks, or complex assemblies identified in subpart B of this part, that is eligible for the procurement preference established under section 9002 of FSRIA.

* * * * *

Intermediate ingredient or feedstock. A material or compound made in whole or in significant part from biological products, including renewable agricultural materials (including plant, animal, and marine materials) or forestry materials that have undergone value added processing (including thermal, chemical, biological, or a significant amount of mechanical processing), excluding harvesting operations, offered for sale by a manufacturer or vendor and that is subsequently used to make a more complex compound or product.

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Procuring agency. Any Federal agency that is using Federal funds for procurement or any person contracting with any Federal agency with respect to work performed under the contract.

* * * * *

Qualified biobased product. A product that is eligible for Federal preferred procurement because it meets the definition and minimum biobased content criteria for one or more designated product categories, or one or more designated intermediate ingredient or feedstock categories, as specified in subpart B of this part.

* * * * *

Relevant stakeholder. Individuals or officers of state or local government organizations, private non-profit institutions

or organizations, and private businesses or consumers.

* * * * *

4. Section 3201.3 is amended by revising paragraphs (c) and (d) to read as follows:

§ 3201.3 Applicability to Federal procurements.

* * * * *

(c) Procuring products composed of the highest percentage of biobased content. Section 9002(a)(2) of FSRIA requires procuring agencies to procure qualified biobased products composed of the highest percentage of biobased content practicable or such products that comply with the regulations issued under section 103 of Public Law 100-556 (42 U.S.C. 6914b-1). Procuring agencies may decide not to procure such qualified biobased products if they are not reasonably priced or readily available or do not meet specified or reasonable performance standards.

(d) This guideline does not apply to purchases of qualified biobased products that are unrelated to or incidental to Federal funding; i.e., not the direct result of a contract or agreement with persons supplying items to a procuring agency or providing support services that include the supply or use of products.

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5. Section 3201.4 is amended by revising paragraphs (b) and (c)

to read as follows:

§ 3201.4 Procurement programs.

* * * * *

(b) Federal agency preferred procurement programs. (1)

On or before July 31, 2015, each Federal agency shall develop a procurement program which will assure that qualified biobased products are purchased to the maximum extent practicable and which is consistent with applicable provisions of Federal procurement laws. Each procurement program shall contain:

(i) A preference program for purchasing qualified biobased products,

(ii) A promotion program to promote the preference program; and

(iii) Provisions for the annual review and monitoring of the effectiveness of the procurement program.

(2) In developing the preference program, Federal agencies shall adopt one of the following options, or a substantially equivalent alternative, as part of the procurement program:

(i) A policy of awarding contracts on a case-by-case basis to the vendor offering a qualified biobased product composed of the highest percentage of biobased content practicable except when such products:

(A) Are not available within a reasonable time;

(B) Fail to meet performance standards set forth in the

applicable specifications, or the reasonable performance standards of the Federal agency; or

(C) Are available only at an unreasonable price.

(ii) A policy of setting minimum biobased content specifications in such a way as to assure that the required biobased content of qualified biobased products is consistent with section 9002 of FSRIA and the requirements of the guidelines in this part except when such products:

(A) Are not available within a reasonable time;

(B) Fail to meet performance standards for the use to which they will be put, or the reasonable performance standards of the Federal agency; or

(C) Are available only at an unreasonable price.

(3) In implementing the preference program, Federal agencies shall treat as eligible for the preference biobased products from "designated countries," as that term is defined in section 25.003 of the Federal Acquisition Regulation, provided that those products otherwise meet all requirements for participation in the preference program.

(c) Procurement specifications. After the publication date of each designated product category and each designated intermediate ingredient or feedstock category, Federal agencies that have the responsibility for drafting or reviewing specifications for products procured by Federal agencies shall

ensure within a specified time frame that their specifications require the use of qualified biobased products, consistent with the guidelines in this part. USDA will specify the allowable time frame in each designation rule. The biobased content of qualified biobased products within a designated product category or a designated intermediate ingredient or feedstock category may vary considerably from product to product based on the mix of ingredients used in its manufacture. Likewise, the biobased content of qualified biobased products that qualify because they are made from materials within designated intermediate ingredient or feedstock categories may also vary significantly. In procuring qualified biobased products, the percentage of biobased content should be maximized, consistent with achieving the desired performance for the product.

6. Section 3201.5 is revised to read as follows:

§ 3201.5 Category designation.

(a) Procedure. Designated product categories, designated intermediate ingredient or feedstock categories, and designated final product categories composed of qualifying intermediate ingredients or feedstocks are listed in subpart B of this part.

(1) In designating product categories, USDA will designate categories composed of generic groupings of specific products or complex assemblies and will identify the minimum biobased content for each listed category or subcategory. As product

categories are designated for procurement preference, they will be added to subpart B of this part.

(2) In designating intermediate ingredient or feedstock categories, USDA will designate categories composed of generic groupings of specific intermediate ingredients or feedstocks, and will identify the minimum biobased content for each listed category or sub-category. As categories are designated for product qualification, they will be added to subpart B of this part. USDA encourages manufacturers and vendors of intermediate ingredients or feedstocks to provide USDA with information relevant to significant potential applications for intermediate ingredients or feedstocks, including estimates of typical formulation rates.

(3) During the process of designating intermediate ingredient or feedstock categories, USDA will also gather information on the various types of final products that are, or can be, made from those intermediate ingredients or feedstocks. Final products that fall within existing designated product categories will be subject to the minimum biobased content requirements for those product categories, as specified in subpart B of this part. New product categories that are identified during the information gathering process will be listed in the Federal Register proposed rule for designating the intermediate ingredient or feedstock categories. A minimum

biobased content for each of the final product categories will also be identified based on the amount of designated intermediate ingredients or feedstocks such products contain. Public comment will be invited on the list of potential final product categories, and the minimum biobased content for each, as well as on the intermediate ingredient and feedstock categories being proposed for designation. Public comments on the list of potential final product categories will be considered, along with any additional information gathered by USDA, and the list will be finalized. When the final rule designating the intermediate ingredient or feedstock categories, by adding them to subpart B of this part, is published in the Federal Register, the list of final product categories will also be added to subpart B of this part. Once these final product categories are listed in subpart B of this part, they will become eligible for the Federal procurement preference.

(b) Considerations. (1) In designating product categories and intermediate ingredient or feedstock categories, USDA will consider the availability of qualified biobased products and the economic and technological feasibility of using such products, including price. USDA will gather information on individual qualified biobased products within a category and extrapolate that information to the category level for consideration in designating categories.

(2) [Reserved]

(c) Exclusions. Motor vehicle fuels, heating oil, and electricity are excluded by statute from this program.

7. Section 3201.6 is amended by revising paragraph (a) to read as follows:

§ 3201.6 Providing product information to Federal agencies.

(a) Informational website. An informational USDA Web site implementing section 9002 of FSRIA can be found at:

<http://www.biopreferred.gov>. USDA will maintain a voluntary Web-based information site for manufacturers and vendors of qualified biobased products and Federal agencies to exchange information, as described in paragraphs (a)(1) and (2) of this section.

(1) Product information. The Web site will provide information as to the availability, price, biobased content, performance and environmental and public health benefits of the designated product categories and designated intermediate ingredient or feedstock categories. USDA encourages manufacturers and vendors to provide product and business contact information for designated categories. Instructions for posting information are found on the Web site itself. USDA also encourages Federal agencies to utilize this Web site to obtain current information on designated categories, contact information on manufacturers and vendors, and access to

information on product characteristics relevant to procurement decisions. In addition to any information provided on the Web site, manufacturers and vendors are expected to provide relevant information to Federal agencies, subject to the limitations specified in § 3201.8(a), with respect to product characteristics, including verification of such characteristics if requested.

(2) National Testing Center Registry. The Web site will include an electronic listing of recognized industry standard testing organizations that will serve biobased product manufacturers such as ASTM International, Society of Automotive Engineers, and the American Petroleum Institute. USDA encourages stakeholders to submit information on other possible testing resources to the BioPreferred program for inclusion.

* * * * *

8. Section 3201.7 is revised to read as follows:

§ 3201.7 Determining biobased content.

(a) Certification requirements. For any qualified biobased product offered for preferred procurement, manufacturers and vendors must certify that the product meets the biobased content requirements for the designated product category or designated intermediate ingredient or feedstock category within which the qualified biobased product falls. Paragraph (c) of this section addresses how to determine

biobased content. Upon request, manufacturers and vendors must provide USDA and Federal agencies information to verify biobased content for products certified to qualify for preferred procurement.

(b) Minimum biobased content. Unless specified otherwise in the designation of a particular product category or intermediate ingredient or feedstock category, the minimum biobased content requirements in a specific category designation refer to the organic carbon portion of the product, and not the entire product.

(c) Determining biobased content. Verification of biobased content must be based on third party ASTM/ISO compliant test facility testing using the ASTM Standard Method D6866, "Standard Test Methods for Determining the Biobased Content of Solid, Liquid, and Gaseous Samples Using Radiocarbon Analysis." ASTM Standard Method D6866 determines biobased content based on the amount of biobased carbon in the material or product as percent of the weight (mass) of the total organic carbon in the material or product.

(1) Biobased products, intermediate ingredients or feedstocks. Biobased content will be based on the amount of biobased carbon in the product or material as a percent of the weight (mass) of the total organic carbon in the product or material.

(2) Final products composed of designated intermediate ingredient or feedstock materials. The biobased content of final products composed of designated intermediate ingredient or feedstock materials will be determined by calculating the percentage by weight (mass) that the biobased component of each designated intermediate ingredient or feedstock material represents of the total organic carbon content of the final product and summing the results (if more than one designated intermediate ingredient or feedstock is used). If the final product also contains biobased content from intermediate ingredient or feedstock material that is not designated, the percentage by weight that these biobased ingredients represent of the total organic carbon content should be included in the calculation.

(3) Complex assemblies. The biobased content of a complex assembly product, where the product has "n" components whose biobased and organic carbon content can be experimentally determined, will be calculated using the following equation:

$$\text{Biobased Content of Product} = \frac{\sum_{i=1}^n M_i * BCC_i * OCC_i}{\sum_{i=1}^n M_i * OCC_i}$$

Where:

M_i = mass of the nth component

BCC_i = biobased carbon content of the nth component (%)

OCC_i = organic carbon content of the nth component (%)

(d) Products and intermediate ingredients or feedstocks with the same formulation. In the case of products and intermediate ingredients or feedstocks that are essentially the same formulation, but marketed under more than one brand name, biobased content test data need not be brand-name specific.

9. Section 3201.8 is amended by revising the section heading and by revising paragraphs (a) and (b) to read as follows:

§ 3201.8 Determining price, environmental and health benefits, and performance.

(a) Providing information on price and environmental and health benefits. Federal agencies may not require manufacturers or vendors of qualified biobased products to provide to procuring agencies more data than would be required of other manufacturers or vendors offering products for sale to a procuring agency (aside from data confirming the biobased contents of the products) as a condition of the purchase of biobased products from the manufacturer or vendor. USDA will work with manufacturers and vendors to collect information needed to estimate the price of biobased products, complex assemblies, intermediate materials or feedstocks as part of the designation process, including application units, average unit cost, and application frequency. USDA encourages industry

stakeholders to provide information on environmental and public health benefits based on industry accepted analytical approaches including, but not limited to: material carbon footprint analysis, the ASTM D7075 standard for evaluating and reporting on environmental performance of biobased products, the International Standards Organization ISO 14040, the ASTM International life-cycle cost method (E917) and multi-attribute decision analysis (E1765), the British Standards Institution PAS 2050, and the National Institute of Standards and Technology BEES analytical tool. USDA will make such stakeholder-supplied information available on the BioPreferred Web site.

(b) Performance test information. In assessing performance of qualified biobased products, USDA requires that procuring agencies rely on results of performance tests using applicable ASTM, ISO, Federal or military specifications, or other similarly authoritative industry test standards. Such testing must be conducted by a laboratory compliant with the requirements of the standards body. The procuring official will decide whether performance data must be brand-name specific in the case of products that are essentially of the same formulation.

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§ 3201.9 [Removed and Reserved]

10. Remove and reserve § 3201.9.

**Subpart B - Designated Product Categories and Intermediate
Ingredients or Feedstocks**

11. Revise the heading to subpart B to read as set forth above.

Dated: July 21, 2014

Gregory L. Parham,
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